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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MBK PROPERTIES LLC,

Plaintiff and Respondent,

v.

SAN DIEGO BEER COMPANY, INC., et al.,

Defendants and Appellants.

G055856

(Super. Ct. No. 30-2016-00834354)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County, Geoffrey T. Glass, Judge. Affirmed.

Ferrucci Law Group and Joseph A. Ferrucci for Defendants and Appellants.

Lapidus & Lapidus and Daniel C. Lapidus for Plaintiff and Respondent.

* * *

San Diego Beer Company, Inc., and its assignee, Cesar Pena (collectively, SDBC), appeal from the trial court's postjudgment order denying SDBC's request for

contractual attorney fees under Civil Code section 1717 (all undesignated statutory references are to this code) after the court determined MBK Properties, LLC (MBK) was the prevailing party in its action to recoup real estate taxes it inadvertently paid on SDBC's behalf. As we explain, because the parties' attorney fee provision in their real estate contract extended to noncontractual claims and the trial court properly determined MBK was the prevailing party in the litigation, there is no merit to SDBC's appeal seeking attorney fees. We therefore affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

MBK sold a ground floor segment (Unit 101) of a larger San Diego commercial parcel to SDBC through a purchase and sale agreement (PSA) in March 2014, which, during escrow, SDBC assigned to Pena with MBK's consent. Escrow closed in April 2014. The San Diego County tax authorities did not segregate the segment from the property as a whole for the July 1, 2014 through June 30, 2015 tax year, instead assessing MBK in November 2014 for the entire building. Not realizing the error, MBK paid the full amount of tax due, and then requested reimbursement from SDBC/Pena, who in turn ignored MBK's "repeated demands."

MBK filed this action asserting, among other theories, that the PSA, in prorating responsibility for real estate taxes based on the date of the close of escrow, required SDBC to pay the taxes assessed for the 2014-2015 tax year, which commenced after closing, and therefore required SDBC to reimburse MBK. The trial court concluded this "cause of action for breach of contract fails" because the PSA "does not contain a contractual obligation for the defendant to pay taxes on the property," stating instead that the obligation arose from "the legal obligation to the taxing authority . . . ."

The trial court, however, granted MBK all the relief it requested. The court concluded MBK's complaint stated a cause of action for equitable subrogation and awarded on that ground the full amount ($40,036.64) MBK sought in reimbursement,

plus costs. The court expressly determined MBK was the prevailing party in the action. Nevertheless, the court denied MBK's attorney fee request on grounds that MBK's claim for reimbursement "did not arise from the contract," but instead equitably by subrogation. The court entered judgment in MBK's favor.

SDBC then sought attorney fees as the prevailing party on MBK's contract claim, which the trial court denied. SDBC now appeals that attorney fee ruling, but not the underlying judgment in MBK's favor. MBK does not cross-appeal the trial court's denial of its request for attorney fees.

DISCUSSION

Invoking section 1717 and the attorney fee provision in its contract (the PSA) with MBK, SDBC contends the trial court was required to grant its attorney fee motion as the prevailing party on MBK's unsuccessful contract cause of action. While the trial court's prevailing party determination "is an exercise of discretion, which should not be disturbed on appeal absent a clear showing of abuse of discretion," we independently examine the "legal basis for an attorney fee award." (*Kim v. Euromotors West/The Auto Gallery* (2007) 149 Cal.App.4th 170, 176.)

If the basis for the court's prevailing party ruling rests in section 1717 and there are no disputed issues of fact, our review is de novo. (*Burkhalter Kessler Clement & George LLP v. Hamilton* (2018) 19 Cal.App.5th 38, 43-44.) In the absence of disputed factual issues, we also review contractual attorney fee provisions de novo. (*Mountain Air Enterprises, LLC v. Sundowner Towers, LLC* (2017) 3 Cal.5th 744, 751; *Orien v. Lutz* (2017) 16 Cal.App.5th 957, 961 (*Orien*).) Our goal in interpreting contractual language is to give effect to the parties' intent, which we discern from the written words they used. (*Orien,* at p. 961.)

SDBC claims it is the prevailing party "'on the contract' under section 1717 because it completely defeated MBK's contract claims." (Bold typeface omitted.) We

disagree. "Before section 1717 comes [into] play, it is necessary to determine whether the parties entered into an agreement for the payment of attorney fees and, if so, the scope of the attorney fee agreement." (*Maynard v. BTI Group, Inc.* (2013) 216 Cal.App.4th 984, 990 (*Maynard*).) As the *Maynard* court explained, "numerous cases" have "made clear" that "a contractual provision may provide that the party that prevails in litigation over *noncontractual claims* shall recover its attorney fees." (*Ibid.*, italics added.)

The parties' attorney fee provision here covers contractual claims, but it extends also to noncontractual claims. The fee provision authorizes attorney fees for standard contractual disputes, namely, "any legal action or any other proceeding . . . brought *to enforce this Agreement*" (italics added). But it goes further. Specifically, the fee provision extends to legal actions or proceedings "brought . . . *in connection with* this Agreement," stating expressly that "the prevailing party shall be entitled to recover reasonable attorneys' fees and other costs . . . ." (Italics added.) While a fee provision that refers only to efforts to "enforce" the agreement effectively limits recovery of attorney fees to contractual disputes (*Loube v. Loube* (1998) 64 Cal.App.4th 421, 429), the "in connection with" language the parties chose here broadly covers tort or other noncontractual claims. (*Cruz v. Ayromloo* (2007) 155 Cal.App.4th 1270, 1277; see also, e.g., *Santisas v. Goodin* (1998) 17 Cal.4th 599, 607 (*Santisas*) [attorney fee provision extended to all disputes "arising out of the execution of this agreement"]; *Miske v. Coxeter* (2012) 204 Cal.App.4th 1249, 1259 [authorizing fees for "any dispute" between the parties].)

In some instances—although not here—the more difficult question can be ascertaining who is the prevailing party when an attorney fee provision covers both contractual and noncontractual disputes. As *Maynard* observed, "[I]t is often unclear in contractual attorney fee provisions entitling the 'prevailing party' (or words to that effect) to an award of attorney fees whether the parties intended fees to be recovered by the party who prevails only on a breach of contract claim or by the party who prevails in a broader sense, considering the action as a whole. *If the latter*," as we explain here, "*neither Civil Code section 1717 nor any other provision* precludes an award of attorney fees to a party prevailing on a [noncontractual] claim, *[n]or authorizes an award to a party who has prevailed in defending a breach of contract cause of action* ***but has been held liable on other related causes of action***." (*Maynard, supra,* 216 Cal.App.4th at p. 990, italics and boldface added.)

Here, we find MBK is the prevailing party under the parties' attorney fee provision for two reasons. First, the trial court made that determination, which is binding under the contractual language. The parties' attorney fee provision specified, as relevant here: "Prevailing party shall include without limitation . . . (b) *the party* that receives performance from the other party alleged to have breached a covenant or *that receives a desired remedy*, . . . substantially equal to the relief sought in an action; *or* (c) the party *determined to be the prevailing party by a court of law*." (Italics added.) There can be no factual dispute that the trial court determined MBK was the prevailing party. Pursuant to the terms of subdivision (c), that determination is final.

Second, under subdivision (b), MBK was the party that "receive[d] a desired remedy . . . substantially equal to the relief sought." The parties' attorney fee agreement in subdivision (b) states that the party "that receives a desired remedy" is the prevailing party when that relief is "substantially equal to the relief sought in [the] action." Here MBK received the entire $40,036.64 it sought for SDBC's share of the taxes. The trial court did not err in finding MBK was the prevailing party on this basis.

SDBC asserts in a footnote that although "[t]he fee clause in the Contract contains a definition of 'prevailing party," that definition is not binding because "contractual provisions that conflict with the definition of 'prevailing party' under section 1717 are void." Again we disagree.

The only conceivable conflict here arises under subdivision (a) of the parties' attorney fee agreement, not under either subdivision (b) or (c). And, subdivision (a) is not relevant here. It identifies the prevailing party as "a party who dismisses an action in exchange for sums allegedly due." Had that occurred here, there would be a conflict with section 1717, subdivision (b)(2), which provides, as *Santisas* explained, "that '[w]here an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be *no prevailing party* for purposes of this section.'" (*Santisas*, *supra*, 17 Cal.4th at p. 617, italics added.) In such instances, *Santisas* determined that section 1717, subdivision (b)(2), statutorily "overrrid[es] or nullif[ies] conflicting contractual provisions [either] expressly allowing recovery of attorney fees in the event of voluntary dismissal or defining 'prevailing party' as including parties in whose favor a dismissal has been entered." (*Santisas*, at p. 617.) Neither of those dismissal scenarios occurred here, so *Santisas* and section 1717 are inapposite.

In sum, where the trial court properly determined MBK was the prevailing party because the parties' attorney fee provision defined the prevailing party as the party that received its "desired remedy . . . substantially equal to the relief sought," or as the party "determined to be the prevailing party by [the] court," there was no basis for the trial court to award SDBC its attorney fees. The court therefore did not err in denying SDBC's fee request.

DISPOSITION

The trial court's postjudgment order denying SDBC attorney fees is affirmed. MBK is entitled to its costs on appeal.

GOETHALS, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.